UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SMYRNA READY MIX CONCRETE, LLC	
and	Cases 09-CA-251578 09-CA-252487
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	09-CA-255573 09-CA-258273

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

On September 1, 2020, Administrative Law Judge (ALJ) Arthur J. Amchan issued his decision in the above-referenced case.[1] Judge Amchan found that Respondent Smyrna Ready Mix Concrete, LLC ("SRM" or "Smyrna") violated the Act by "terminating Sunga Copher, giving the Winchester drivers a cash bonus, soliciting their grievances, terminating [plant manager] Aaron Highley, changing the Winchester facility to an on-demand plant and terminating all of the concrete drivers who worked there." (ALJD 2:5-8). Judge Amchan also found that Respondent violated the Act by "requiring the drivers to sign its separation agreement on January 13, 2020 in order to receive enhanced benefits." (*Id.* at 2:8-10). In line with these findings, Judge Amchan ordered Smyrna to reinstate and make whole Highley, Copher, and the rest of the terminated drivers, and to reopen its Winchester, Kentucky facility, returning it "to the status quo ante as of January 10, 2020." (*Id*. at 28:40-41). Judge Amchan dismissed the rest of the allegations in the Complaint. (*Id.* at 2:10).

Smyrna has filed Exceptions and a brief in support, urging the Board to overturn the ALJ's decision. In spite of the overwhelming evidence supporting Judge Amchan's decision, Smyrna insists there is no basis to find that it violated Sections 8(a)(1) or (3) of the Act. Judge Amchan's decision, however, was a careful analysis based on several days of hearing, voluminous documentary evidence, witness demeanor and credibility, and a thorough detailing of events in light of current Board law. Smyrna's Exceptions are not supported by the record, and the Board should dismiss the Exceptions and affirm Judge Amchan's decision in its entirety.

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[1] JD-33-20. References to the Administrative Law Judge's Decision will be referred to as "ALJD __." References to Respondent's brief in support of Exceptions will be referred to as "Brief ISO Exceptions __." References to the transcript from the underlying ULP hearing will be referred to as "Tr. __." References to the General Counsel's exhibits, Union's exhibits, and Respondent's exhibits will be referred to as "GCX __," "UX __," and "RX __," respectively.

II. ARGUMENT

A. Judge Amchan's Credibility Determinations were Proper.

At the outset, many of Respondent's exceptions are based upon what it perceives to be the ALJ's erroneous credibility determinations. Smyrna argues that not all of the credibility determinations are based on demeanor and, therefore, should be independently assessed by the Board. It is beyond question that the credibility determinations of administrative law judges should be given a great deal of weight and overturned only "where the clear preponderance of all the relevant evidence convinces the Board that they are incorrect." *Standard Drywall Products,* 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3rd Cir. 1951). Contrary to Respondent's claims, the ALJ's findings on credibility are overwhelmingly supported by both the record evidence and Board law.

Here, Judge Amchan generally credited the testimony of the General Counsel's witnesses over those of Respondent. But, contrary to SRM's contention that the ALJ attempted "to discredit anything and anyone that support[ed] SRM," (Brief ISO Exceptions at 23, n. 25), Judge Amchan did not fully credit the General Counsel's witnesses on all points. For example, the ALJ declined to credit "purely self-serving testimony from. . . Highley" (ALJD 7:3-4) and found that "Copher's initial testimony about Taylorsville was less than candid and he backtracked when confronted with his affidavit." (ALJD 13, n. 20). The ALJ went on to properly find that SRM violated the Act based on his determination of both credibility and a preponderance of all relevant evidence. It is well settled that where demeanor is not determinative, an administrative law judge may properly base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and reasonable inferences which may be drawn from the record as a whole." *Shen Automotive Dealership Group,* 321 NLRB 586, 589

(1996). The ALJ's credibility determinations were supported by the record and his findings should be given deference.

B. Judge Amchan Correctly Determined that Smyrna Unlawfully Discharged Sunga Copher.

Smyrna has tried to link Copher's discharge to alleged poor work performance, "milking the clock," excessive overtime, and refusal to drive to the Florence and Taylorsville facilities. But, the record is rife with evidence regarding Copher's union activities and Respondent's knowledge of it. Ben Brooks knew about the union meeting that had occurred on November 7. Smyrna supervisor Chris Newell heard Winchester driver Nicole Long discussing a "meeting" the Winchester employees had the night before, as well as a "sign-in sheet."[2] (Tr. 1350). Long had this conversation with Georgetown plant manager, Roy Chasteen. (Tr. 1350, 1687-89). Newell felt he needed to report the meeting immediately to Brooks, and he specifically told Brooks about the sign-in sheet, testifying that he "didn't think they would be eating pizza and beer when [he] heard the sign-in sheet thing." (Tr. 1413, 1419-20). Brooks told Newell to report back to him if he heard anything else. (Tr. 1421). Based on the evidence, it was appropriate for the ALJ to discredit Brooks' testimony that Chasteen told him he did not know anything about a union meeting. (ALJD 4, fn. 6). Chasteen at least told Brooks he knew there were "a couple drivers up there that [were] making it difficult on the others." (Tr. 1097). And Nicholasville plant manager Jason Stott had already told Brooks that Copher had tried to get some of his

[2] While Long testified she could not remember talking about a sign-in sheet on that particular day, she did remember it coming up at some point. It is likely that she did bring up the sign-in sheet since both Newell and Brooks testified to that; it is illogical they would make up hearing about a sign-in sheet and it makes sense given the ensuing sequence of events. (Tr. 1417-19).

drivers to "buck with him" and that "[t]hose guys were stirring the pot." (Tr. 1024-25). Judge Amchan properly found that Respondent knew of Copher's union activity.[3]

It was also proper for Judge Amchan to infer union animus, which can be done through circumstantial and direct evidence. (ALJD 18:8-19:12 (internal citations omitted)). Judge Amchan specifically found animus and discriminatory intent based upon "the timing of [Copher's] discharge," which was almost immediately following Brooks learning of the union meeting, "the lack of any warning about his alleged misconduct/poor performance" with no "opportunity to address the allegations against him, and SRM's unexplained departure from its progressive discipline policy." (ALJD 18:25-30, citing *Tubular Corp. of Am.*, 337 NLRB 99 (2001)).

When evaluating the element of union animus, it is unnecessary to show "a particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10 (September 4, 2015); *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (September 15, 2017) ("we emphasize that such a showing is not required"). An unlawful motive is strongly demonstrated by Company witnesses' repeated references to the "culture" at Smyrna. James Goss told Ben Brooks "we've got a problem in Winchester." (Tr. 1092). Chris Newell testified that the "attitudes" of the Winchester employees were "pathetic." (Tr. 1431). "They were pissed off that Aaron [Highley] was gone." (Tr. 1431). Newell reported what he heard about a "drivers only" meeting right away

[3] Respondent has emphasized that Copher's termination was lawful, in part, because it would have made more sense for it to target Long, not Copher. *See* Brief ISO Exceptions at 17. An employer does not need to take adverse action against *all* union supporters in order to act unlawfully. Also, Smyrna's argument overlooks the fact that it *did* eventually terminate Ms. Long as well.

to Brooks because this type of meeting conflicted with the "we're all in this together" culture at Smyrna. (Tr. 1415). These types of euphemisms, along with telling Copher he was being fired for his "negative attitude," are all "code phrase[s] for union activity." (ALJD 19:9-12, fn. 25, internal citations omitted).[4]

Smyrna has also excepted to Judge Amchan's refusal to give any weight to the secret recording Copher made of his conversation with Ben Brooks when he was terminated. (Brief ISO Exceptions at 23-24). Frankly, Smyrna should be thankful for the ALJ's decision on this point. The recording does not show Brooks was "surprised" when Copher mentioned the Union because he did not know anything about a union; it shows Brooks was "surprised" that Copher might have caught him. When Copher mentioned the Union, Brooks did not say "I don't know what you're talking about," or anything remotely similar. Brooks responded by telling Copher, "eehhh . . . I'm here about other things *too*." (RX. 90). And Brooks' explanation for his use of the word "too" – that he was linking the work performance with the negative attitude – is nonsensical. (Tr. 1105-06). Rather, Brooks' response is exactly what one would expect from a supervisor treading lightly and attempting to cover up the actual, unlawful reason for a discharge. This conclusion is further bolstered by the fact that Brooks "forgot" that Copher mentioned the Union in the termination meeting and did not include it in his affidavit. (Tr. 1105-06). If anything, the recording only further supports Judge Amchan's findings.

[4] Smyrna's purchases of union facilities or certain individuals' ties to the Teamsters do not negate this animus. The record was clear that Smyrna preferred to be and remain non-union. (Tr. 870-71, 885, 904-06, 1172, 1629).

C. Judge Amchan Correctly Determined that Ben Brooks Unlawfully Solicited Grievances, and Impliedly Promised to Remedy those Grievances, from the Winchester Drivers.

Soliciting grievances during an organizing campaign is unlawful, particularly when the employer promises to remedy those grievances without any similar previous practice. *Center Construction Co., Inc.*, 345 NLRB 729, 729-32 (2005). Respondent has characterized the meeting on November 15 at the Winchester facility as a "typical safety meeting." (Brief ISO Exceptions at 34). Atypical, however, was Ben Brooks' appearance at such a meeting. In fact, Brooks had *never* held a safety meeting at Winchester until November 15, 2019. (Tr. 1197). Smyrna drivers consistently testified they rarely saw Brooks at Winchester until the union organizing drive began and Copher and Highley were fired. Even if Brooks' cell phone number was visible in the plant, other than Brooks' own self-serving testimony, there is no evidence that employees actually used it. (Tr. 1110). For Brooks to come to Winchester and make a point that anyone could reach him at any time "[i]f there were any concerns, any issues they might have had about anything" was an implicit and unlawful promise to fix their grievances. (Tr. 1111; ALJD 20:19-26). *See also, Doane Pet Care,* 342 NLRB 1116 (2004) (telling employees that issues raised by those employees during a union campaign would be looked into found unlawful); *Grouse Mountain Associates II*, 333 NLRB 1322, 1324 (2001) (remedial promise does not need to be specific or explicit); *Majestic Star Casino,* 335 NLRB 407, 408 (2001) (employer's statement that it would look into employees' concerns found unlawful).

D. Judge Amchan Correctly Determined that Ben Brooks Unlawfully Distributed $100 in Cash to the Winchester Drivers.

The ALJ correctly found that the $100 cash bonus Ben Brooks gave to Winchester drivers on November 15 violated the Act. Brooks' stated rationale for giving the bonus as a token of appreciation is contrary to SRM's position that the Winchester drivers were doing a horrible job and causing profit losses for the Company. Further, the evidence revealed that this

was not a common practice at Winchester. Respondent has alleged that "Brooks, Means, James, Walters, Hollingshead, Highley, Stott and Goss testified that the bonuses Brooks' [sic] distributed were consistently a $100 amount." (Brief ISO Exceptions at p. 36). This is misleading. When Brooks gave $100 bonuses, it was generally given to managers. (ALJD 6:15-17; Tr. 1613-14). In addition, even if Brooks had given $100 bonuses at other locations in the past, he had never given such a bonus to Winchester drivers before. Brooks himself testified that November 15 was not only the first time he had ever given Winchester drivers a bonus, it was the "first ever safety meeting [he] held at the Winchester plant." (Tr. 1197).[5] The Board draws an inference of improper motivation from all the evidence presented and from the employer's failure to establish a legitimate reason for the timing of the benefit. *Holly Farms Corp*., 311 NLRB 273, 274 (1993); *see also Manor Care Health Services — Easton*, 356 NLRB 202, 222 (2010) ("Absent showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.") (internal citations omitted). Judge Amchan correctly characterized this bonus as an unlawful act – "a fist inside the velvet glove." (ALJD 19:17-18).

E. Judge Amchan Correctly Determined that SRM Unlawfully Discharged Plant Manager Aaron Highley.

Though supervisors are normally not protected under the Act, an employer violates Section 8(a)(1) if it discharges a supervisor for giving adverse testimony, refusing to commit

[5] As Judge Amchan ultimately found, this admission by Brooks clearly contradicts and should be credited over what was Walters' faulty recollection about receiving a $100 bonus at Winchester the year prior. (ALJD 6, n.10; Tr. 480-81). And the overwhelming evidence from other witnesses was that Brooks had never done so. The dialogue at the hearing between Judge Amchan and Counsel for the General Counsel relied on by SRM (Brief ISO Exception at 36; Tr. 715-16) does not establish otherwise. Not all of the evidence had been heard at that point, briefs had not been submitted, and the ALJ is not bound by any leanings he may have had at a discrete point in time during the hearing. Rather, Judge Amchan properly weighed all of the evidence before making a decision.

unfair labor practices, or failing to prevent unionization. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402-03 (1982) (internal citations omitted). The violation of the Act in these situations stems "from the need to vindicate employees' exercise of their Section 7 rights." *Id.* at 402-03. In this case, Judge Amchan correctly found that the proffered reason for Highley's termination was a pretext, and the real reason was Highley's failure to surveil employees' union activities. (ALJD 20:30-21:26).

Highley testified that Ben Brooks had "given him a week" to provide him with a list of names of those employees involved in the union campaign. (Tr. 761; ALJD 6:33-35). Highley's unemployment paperwork, submitted by Brooks' wife, supports Highley's allegations. (UX 13; Tr. 1272-73). The unemployment documents state that Highley received a "verbal coaching" on November 11, 2019 and then was terminated *one week later*. (UX. 13) No such coaching occurred, but it supports Highley's version of events. Nor did Brooks specifically contradict Highley's testimony regarding their conversation on the day he was fired. (ALJD 6:37-38).

Termination must stand or fall on the reasons given at the time of termination. And the *only* reason Brooks gave to Highley for his termination was that SRM was "going in a different direction." (Tr. 1201). In spite of Smyrna's insistence that it discharged Highley due to his performance, Brooks never informed Highley of any complaints or told him he had mismanaged his facility. (Tr. 1249-50, 1703). Perhaps this is because Highley had increased the concrete yardage from Winchester by a greater percentage than any other plant in Brooks' jurisdiction. The timing of Highley's termination – only 10 days after he voiced disapproval of his nephew Copher's abrupt termination, along with Brooks' statement that he would rather shut down the plant than allow it to unionize – further demonstrate Smyrna's antiunion motivation in discharging Highley. *See, W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (listing

variety of factors from which discriminatory motivation can be inferred, including proximity in time to union activities).

SRM argues the ALJ should have applied *Spring Valley Farms*, 272 NLRB 1323 (1984) to this case. Judge Amchan did consider *Spring Valley Farms,* but he determined that case was inapposite. (ALJD 21, fn. 26). *Spring Valley Farms* is distinguishable for several reasons. In *Spring Valley Farms,* the Board affirmed the ALJ's decision that a fired employee was a supervisor, and that discharging her did not violate the Act. In that case, employees had filed for an election, and the employer asked a supervisor "how [she] thought the drivers were going to vote," told her to get a count, and warned her if the union won she would be fired. *Spring Valley Farms,* 272 NLRB at 1328. The union prevailed in the election, and the employer fired the supervisor. *Id.* Analyzing the case under *Talladega Cotton Factory*, 106 NLRB 295 (1953), *enf'd*. 213 F.2d 209 (5th Cir. 1954), the ALJ held the discharge did not violate the Act, finding "no evidence of an overall campaign . . . to defeat the Union." *Spring Valley Farms*, 272 NLRB at 1332. The ALJ also found that the employer had no plans to do anything "unlawful or discriminatory" with the information. *Id.*

In this case, the evidence showed that Smyrna's request of Highley, and his discharge, was part "of an overall campaign . . . to defeat the Union." *Id.* The multitude of Smyrna's unfair labor practices is evidence, in and of itself, that it planned to engage in "unlawful or discriminatory" behavior with whatever information it sought from Highley. *Id.* In addition, in *Spring Valley Farms,* the employees were far enough along in their union organizing drive that they had filed a petition for an election. And the Union won. The supervisor was not fired until after the election, when the union was already certified. This is less detrimental than here, where the organizing drive was barely off the ground. The timing of the Highley's discharge in relation

to his nephew Sunga Copher[6] "plainly demonstrated to rank-and-file employees that this action was part of its plan to thwart their self-organizational activities." *Id.* (quoting *Talladega Cotton*, 106 NLRB at 297). Testimony revealed that employees began to keep quiet about the union because they "didn't want to risk [their] jobs." (Tr. 432). Firing Highley caused the drivers "reasonably to fear that Respondent would take similar action against them if they continued to support the Union." *Id.* (quoting *Talladega Cotton*, 106 NLRB at 297); s*ee also Southern Pride Catfish*, 331 NLRB 618, 619-620 (2000). The reasonableness of this belief is best stated by Company witness James Goss, who testified employees were "scared . . . because they just got through getting rid of that Copher guy, and then they got rid of Aaron . . . so maybe they thought they could be next." (Tr. 957).

F. Judge Amchan Correctly Determined that SRM Unlawfully Closed and Converted the Winchester, Kentucky Facility to an On-Demand Facility and Terminated the Remaining Drivers.

Smyrna's decision to close the Winchester plant and convert it to an on-demand facility was in response to union activity, motivated by union animus, and violated the Act. The Company's knowledge of the union campaign and its concern with the remaining Winchester employees' "failure to 'get on board' is simply code for their known or suspected union activities." (ALJD 24:38-39). Animus was also properly inferred given the "inherently destructive" nature of Respondent's actions in terminating all of the remaining drivers. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967).[7]

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[6] Judge Amchan also correctly determined that Highley's familial relationship to Copher was a motivating factor in his discharge. (ALJD 21:16-20). Smyrna took no action to address Highley's alleged mismanagement until *after* it learned of the union campaign and considered the close family relationship between Highley and Copher.

[7] Respondent has excepted to the ALJ's reliance on *Great Dane* (Brief ISO Exceptions at 42, n. 34) arguing that the factors in *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 275-76 (1965) apply. However, as discussed, *infra*, the ALJ did also analyze the closure

Respondent's reliance on *Dura-Line Corp.*, 366 NLRB No. 126, slip op. (July 12, 2018), is misplaced. In *Dura-Line*, the Board reversed the ALJ and held that an employer's plant closure did not violate the Act. In that case, the employer, which had a union present, was purchased by a multinational corporation. *Id.* at *1. The employer submitted a lengthy proposal to its successor, with a multitude of business reasons to shut down the union facility and reopen in another location, including the ability to run 24/7. *Id.* This facility also had sustained substantial damage when its roof collapsed. *Id.* After a few months, the employer identified a new site and submitted a proposal for closure, which including transferring work to three locations. *Id.* The employer notified the middle managers at the facility and the union that it would be closing the facility in approximately four months, and it engaged in effects bargaining with the union. *Id.* at *2. The employer invested more than $20 million in the relocation and increased its average earnings by approximately $10 million. *Id.*

The situation in *Dura-Line* is worlds away from the one at Smyrna Ready Mix. There is no evidence that the decision to close the Winchester facility was precipitated by months of planning and detailed corporate-level analyses. Ben Brooks recommended that Winchester be shut down and converted to an on-demand facility. (ALJD 9:21-23). And the reason for the conversion admittedly included non-economic reasons. It was a logical step for the ALJ to conclude that these non-economic reasons, such as employees "not getting on board" actually referred to "concern regarding continued union activity or other protected activity by Winchester employees." (ALJD 9:35-37).

under *Darlington*. Further, the analysis of a partial closure does not preclude the ALJ from also finding that SRM's actions were inherently destructive to Section 7 rights under *Great Dane.*

SRM's emphasis on "EBITDA" as the reason for the closure is disingenuous. The EBITDA difference for Winchester can easily be explained by examining the hours spent assisting other facilities. Smyrna witnesses admitted that the EBITDA report did not account for the hours Winchester drivers spent at other facilities, helping those facilities increase their own yardage. (Tr. 1485-87, 1528-29). Furthermore, Winchester is very rural compared to the other facilities and requires longer driving times. (Tr. 38, 763, 410, 846, 1014, 1300, 1364-1365, 1652). The Company's reliance on "normalization" cannot explain away clear evidence that the Winchester facility was doing well. (Tr. 1473-78). And if plants live and die by EBITDA, why did Smyrna take no action to correct these alleged inefficiencies for the nearly 18 months prior to employees demonstrating an interest in organizing? (Tr. 763, 937-938, 1202, 1217, 1303-1304, 1378, 137, 1591-1593, 1600) *Cf. Armstrong Rubber Co. v. NLRB*, 849 F.2d 608 (6th Cir. 1988) (enforcing finding that after notice of a union representation petition, employer changed agreed-upon plan to cut four employees to cope with work slowdown and instead terminated the entire proposed unit). Any "inefficiencies" did not just arise overnight. SRM hopes the Board will focus on complicated-sounding accounting principles and ignore the simple and obvious facts before it.

Furthermore, Smyrna's emphasis on its offer of work to Jason Means is not dispositive. David Smith asked to transfer to another facility, and he was denied. (Tr. 1216). Sheldon Walters also asked about transferring to other facilities. (Tr. 442). Furthermore, an employer does not have to retaliate against all union supporters to violate the Act. *Volair, Inc.*, 341 NLRB 673, 676 n. 17 (2004). Importantly, Means refused the work because he was concerned about the reliability of his vehicle, so he asked Brooks if he could park the tanker truck at Winchester and drive from there everyday. (Tr. 657-58). Brooks told Means this was not an option, with no

other explanation. (Tr. 659). Had Brooks really intended his offer to be genuine, he could have accommodated the request.

No legitimate reason existed to terminate all of the remaining drivers. Any claims of poor performance is belied by Brooks' compliments and cash bonus to the drivers on November 15.[8] SRM did not discipline any of the remaining six drivers, and in fact, reassured them time and time again that they should not be concerned about job security. (Tr. 469, 581, 618). Nor were the drivers engaged in a partial strike. The drivers all testified that they discussed not wanting to go to Florence, and some of them stopped *volunteering* to go. (Tr. 120-21, 123, 231-33, 545-48, 638-40, 679, 746, 843). Even Ben Brooks testified that "[Highley] never said they refused. He said they did not like to go." (Tr. 1179). Refusing voluntary work is protected, concerted activity and "it is well settled that where the duties that the employees refuse to perform are voluntary or discretionary, the refusal to perform them cannot be deemed a partial strike." *St. Barnabas Hosp.*, 334 NLRB 1000, 1011-12 (2001 (internal citations omitted)). Even assuming the plan had been to, someday, refuse to go to a location when told, these were unexecuted plans that cannot be used as grounds for discharge. *Id.*; *Hotel Holiday Inn*, 259 NLRB 496, 500-501 (1981), *enf'd* 702 F.2d 268 (1st Cir. 1983) (employees' conduct protected despite union's plan to stage unprotected sit-down strike, because plan for unprotected activity was forestalled).

Applying the factors for a partial business closure expressed in *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 275-76 (1965), the ALJ properly found that SRM had

[8] And if SRM contends Brooks' praise and the bonuses did *not* indicate that the drivers were doing good work then what they were for? SRM cannot argue they should be ignored for purposes of analyzing performance and also be ignored in terms of inferring discriminatory motivation.

both the purpose and effect of chilling union activity in its remaining facilities. (ALJD 23:40-24:11). SRM's argument that the Winchester closure was lawful because "[t]here was no Section 7 activity to chill" is incredible. Any diminished union activity only occurred as a direct result of SRM's unlawful and discriminatory discharges of Copher and Highley, causing the remaining employees to fear retaliation. But is also inaccurate to characterize the nascent organizing campaign as "dead." Georgetown drivers knew about the Union campaign at Winchester and had even spoken with Teamsters organizer John Palmer. (Tr. 55, 364). And the plant manager at Georgetown, Roy Chasteen, was also aware of the union campaign because Nicole Long told him about the union meeting. (Tr. 1687-89). After SRM fired Copher and Highley, union supporters remained, and Chris Newell and James Goss admitted hearing the drivers talk about the union after taking over the facility. (Tr. 955-56, 1415, 1418-19, 1421-22). Goss heard employees say that the "drivers only" meeting was actually a union meeting, and that employees thought Copher had been fired because he had tried to form a union. (Tr. 955-57). Ben Brooks was also at Winchester when some of these conversations occurred. (Tr. 1432). In fact, Newell, who repeatedly made reports to Brooks about employee developments, testified he did not need to report this activity because he "assumed that the people that needed to know about the union conversations were aware of it." (Tr. 1432-33). Any testimony that the union campaign was "dead" does not mean that it was, or more importantly, it does not mean Smyrna actually *believed* the campaign was dead at the time it decided to convert Winchester to an on-demand facility.

G. Judge Amchan Correctly Determined that the Separation Agreements Signed by Six Drivers were Unlawful and Unenforceable.

The Board will only find an employee's waiver of Section 7 rights lawful if it is narrowly tailored to the facts giving rise to the settlement and the employee receives a benefit in return for

executing the agreement. *S. Freedman & Sons, Inc.* 364 NLRB No. 82, slip op. at 1-2 (Aug. 25, 2016). Settlement provisions that purport to broadly prevent employees from assisting with Board charges filed by other individuals are unlawful where an employer has already demonstrated its willingness to retaliate against employees for engaging in Section 7 activity. See, *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 n. 12 (June 22, 2018) (waiver that would have required unlawfully discharged employee to waive Section 7 right to provide assistance to former coworkers, disclose information to the Board, or make disparaging remarks or take actions "detrimental" to the employer was unlawful), *enf'd* 779 F. App'x 752 (D.C. Cir. 2019). The "[f]uture rights of employees as well as the rights of the public may not be traded away in this manner." *Ishikawa Gasket America*, 337 NLRB 175, 175-76 (2001), *enf'd* 354 F.3d 534 (6th Cir. 2004).

The purported "savings" language of the non-disparagement provision, explicitly stating that it does not apply to "truthful report[s] to any government agency with oversight responsibility for [Smyrna]" does not undo its unlawful message. See e.g., *Metro Networks*, 336 NLRB 63, 66-67 (2001) (finding settlement provisions prohibiting discriminatees from communicating about the employer or aiding in claims "except as required by law" unlawful). Participating in investigations conducted by the Board is notably absent from the listed exceptions. And this language failed to reassure employees that they could participate in a Board investigation without breaching the terms of their agreement. Sheldon Walters testified that the language in the agreement caused him to ignore the NLRB investigator's phone calls because he was concerned he "could be sued for even talking about [the case]." (Tr. 451). Smyrna also argues that the provisions in the release prohibiting employees from seeking employment with it or any related Company in the future were not unlawful because "employees were told that they

were eligible for rehire despite boilerplate language to the contrary." (Brief ISO Exceptions at 45). Frankly, it is absurd for attorneys to argue that the written language in a contract should simply be ignored because the signer was told something different. More to the point, the release also contains an "entire agreement" provision, where the employee must acknowledge that the "Agreement supersedes all prior and contemporaneous oral and written agreements *and discussions with respect to the subject matter hereof*" and "may be amended or modified only by written agreement signed by both parties." (GCX 3, 4, 10, 11, 20, 21, emphasis added). Employees who signed this agreement but wanted to be rehired would have to risk breaching the agreement with very little support for their position.

Respondent incorrectly relies on *Baylor University Medical Center*, 369 NLRB No. 43, slip op. (Mar. 16, 2020). While the release provisions in *Baylor* were similar to the ones at issue here, the Board held those provisions did not violate the Act in large part because the agreement was executed under lawful circumstances with no allegations of discriminatory discharge. Judge Amchan did not need to specifically acknowledge *Baylor's* limiting of other cases because this case is easily distinguishable. The rationale in *Baylor* for finding the release lawful simply does not exist here. Here, SRM "has already demonstrated its willingness to retaliate against employees for engaging in Section 7 activity." (ALJD 27:16-20). SRM has tried to create a loophole by arguing there was no active organizing campaign so *Baylor* should apply. (Brief ISO Exceptions at 43). This is an odd argument, given that any stop to the organizing campaign would only be of SRM's retaliatory conduct.

H. Judge Amchan's Remedy, Ordering SRM to Offer Reinstatement and Backpay to all Discharged Employees and Reopen the Winchester Facility, was Proper.

SRM closed Winchester and discriminatorily discharged its workforce; therefore, the ALJ's order that the Winchester facility be reopened was proper. The evidence does not show

that such a remedy would be unduly burdensome for Respondent. On the contrary, SRM retained its mechanics and has continued operations at Winchester since January 10, 2020. (Tr. 72-73, 445, 667, 723-24).

Judge Amchan's order to reinstate Sunga Copher with backpay was proper, given the evidence of his discriminatory discharge. Furthermore, any after-acquired evidence does not require a different result. *Supershuttle of Orange County*, 339 NLRB 1 (2003); *Kiddie, Inc.*, 294 NLRB 840, 840, n. 3, 4 (1989). SRM has a heavy burden to show that Copher's alleged no-call, no-shows bar reinstatement since this was not a factor in its original decision to discharge. The conduct must be "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." *Hawaii Tribune-Herald*, 356 NLRB 661, 662-63 (2011). Judge Amchan correctly decided that SRM had not met its burden; it had never terminated an employee for three no-call, no-shows before and that this does not "render Copher unsuitable or unfit for further employment with SRM." (ALJD 26:1-14). Copher explained the reasons for the three incidents with no evidence to the contrary. There were legitimate reasons for him not to work, including emergency surgery and an auto accident, and he later brought in excuses. (Tr. 1711-12, 1718-20). This is not an employee who simply abandoned his job.

Judge Amchan also correctly determined that the proper remedy for Aaron Highley is reinstatement and backpay. Again, Judge Amchan correctly held that Highley's discharge violated the Act. SRM's argument that requiring it to reinstate Highley "unjustly impinges on [its] recognized right to manage its business" (Brief ISO Exceptions at 49) ignores the fact that its reasons for terminating Highley were pretextual and unlawful. There is no legitimate reason to limit the remedy in this case.

Finally, the ALJ properly ordered reinstatement and backpay for Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling, and Jason Means. The Board uses the same standard for assessing the effect of employee waiver and release agreements as it does for non-Board settlements of unfair labor practice cases. *See e.g. A.S.V., Inc.*, 366 NLRB No. 162, slip op. (Aug. 21, 2018). Judge Amchan properly applied these factors under *Independent Stave Co.*, 248 NLRB 740, 743 (1987),[9] and held the agreements should not be given effect because: 1) Charging Party Union did not agree to be bound to the agreement;[10] 2) the settlement was unreasonable because it required the employees to never seek rehire at SRM and to give up certain Section 7 rights; and 3) at the time SRM terminated the six drivers, it "had a history of violating the Act in firing Sunga Copher, giving illegal bonus payments and soliciting grievances . . . and terminating Aaron Highley for refusing to spy on employees' protected activities." (ALJD 27:36-43).

In addition to the *Independent Stave* factors, the evidence supports independent bases for finding the agreements unenforceable. "[I]t is well established that the Board will not uphold a severance agreement that 'was not a bona fide offer of settlement, but was extended as part of a broader scheme to eliminate union supporters.'" *A.S.V.*, 366 NLRB at *2 (quoting *Clark Dist. Systems.*, 336 NLRB 747, 751 (2001). Any agreements, such as those here, that "would reasonably tend to chill statutorily protected activity" are unenforceable. *Id.* at *3.

[9] It was not necessary for Judge Amchan to apply all of the *Independent Stave* factors, which are simply a "guide 'to assess whether the purposes and policies underlying the Act would be effectuated by . . . approving the agreement.'" *A.S.V.*, 366 NLRB at n.9 (quoting *Independent Stave*, 287 NLRB at 743).

[10] The fact that Teamsters organizer John Palmer did not advise any of the drivers to revoke the agreements is of no consequence. (Brief ISO Exceptions at 47). Palmer is not an attorney, and the Union has not been certified as the exclusive representative of the employees.

III. CONCLUSION

Respondent Smyrna Ready Mix Concrete, LLC engaged in multiple, egregious violations of the Act. Judge Amchan rightly recognized SRM's activities for what they were – blatant (and successful) attempts to stop an organizing campaign in its tracks. The record overwhelmingly supports Judge Amchan's findings, and the remedies proposed are particularly appropriate in this case.

The Union requests the Board affirm the Administrative Law Judge's decision in its entirety and dismiss Respondent's Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was on November 19, 2020, filed electronically with the NLRB and copies of same were sent via email to the following:

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